Date: 20240903

Files: 566-02-39110 and 39111

Citation: 2024 FPSLREB 122

Federal Public Sector Labour Relations and Employment Board Act and *Canada Labour Code*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

TOBY-LEE SAUNDERS

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Saunders v. Treasury Board (Department of National Defence)

In the matter of grievances referred to adjudication under section 209(1)(a) of the *Federal Public Sector Labour Relations Act*

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Abudi Awaysheh and Kourosh Farrokhzad, representatives

For the Employer: Marylise Soporan, counsel

Decided on the basis of written submissions,
filed November 1 and 10 and December 3, 2021, January 10, 2022,
July 24 and October 31, 2023.

I. The issue of jurisdiction

[1] On November 1, 2021, counsel for the Department of National Defence ("the employer") wrote to the Federal Public Sector Labour Relations and Employment Board ("the Board") about the matters in Board file numbers 560-02-9764 and 566-02-39105 to 39111, all of which had been scheduled for a hearing from December 13 to 17, 2021, inclusively. The employer raised a jurisdictional objection to the Board hearing those matters, citing the doctrine of *res judicata*, which states that once a matter has been decided, it cannot be relitigated.

[2] On December 3, 2021, counsel for the grievor agreed with the employer on the *res judicata* issue and withdrew the matters in Board file nos. 560-02-9764 and 566-02-39105 to 39109.

[3] However, in the same correspondence, counsel for the grievor maintained that the Board must still hear the grievances in files 566-02-39110 and 566-02-39111. The hearing was adjourned *sine die* (without a fixed date) to await the parties' arguments on the issue of the Board's jurisdiction over the grievances in those two files. This decision pertains to those arguments.

[4] On January 10, 2022, the employer formally raised a preliminary objection to the matters in these two grievances, writing, "In grievance 566-02-39110, the grievor alleged that the employer violated 'the Canadian Privacy Act'. Similarly, in grievance 566-02-39111, the grievor alleged that the employer '… violated my Privacy as legislated under the Privacy Act …'".

[5] The employer added this on January 10, 2022:

> …
>
> *… what remains now are allegations based on the* Privacy Act*, making this case ineligible for individual-grievance adjudication. The Board's predecessor in* [*Boivin v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 98] Boivin *clearly stated that although a grievor may file a grievance based on a contravention of a section of the* Privacy Act*, they* ***cannot*** *refer it to adjudication as it does not fit any of the parameters of s. 209.*
>
> …
>
> [Emphasis in the original]

[6] Thus, the employer requested that the remaining two grievances not be heard, based on the Board's lack of jurisdiction.

[7] On July 24, 2023, the grievor replied to the employer's jurisdiction objection, submitting as follows:

> …
>
> *… the allegations of discrimination set out in these two grievances are intimately connected to potential breaches of the Collective Agreement as well as potential* Privacy Act *violations. These allegations are separate and distinct from the Grievor's previous allegations of discrimination involving the SERLO process that formed the basis of the Employer's previous preliminary arguments.*
>
> *In essence, it is our position that these two grievances allege specific and new acts of discrimination in addition to allegations of potentially numerous breaches of the collective agreement as well as violations of the Grievor's privacy in the workplace, thereby providing the Board jurisdiction to hear both grievances under pursuant to [sic] Article 6 and 19 of the Collective Agreement.*
>
> …

[8] The grievor reproduced these portions of the presentation of the grievance numbered 6491 and dated June 10, 2014, in Board file no. 566-02-39110:

> …
>
> *I grieve management at Dental Unit and Health Services Ottawa have violated my Canada Human as well as my Collective Agreement under Article 19.*
>
> *I grieve management at Dental Unit and Health Services Ottawa has violated my Collective Agreement under Article 19 by harassment by violating the Canadian Privacy Act and Policy as well as not abiding by the Canadian labour Code as mandated by law.…*
>
> …
>
> [*Sic* throughout]

[9] The grievor then set out her requested corrective measures in that grievance as follows:

> …
>
> *1. That management at 1 Dental Unit HQ Ottawa conduct an investigation into violation of my rights under the Canadian Privacy Act and the Bullying laws under Canadian Labour Code as mandated by law.*
>
> *2. That management at 1 Dental Unit Ottawa cease the violation of Article 19 of the collective agreement by ensuring MWO Aldrich does not continue to provide other people with my personal information, including my ex-husband.*

> *3. That management at 1 Dental Unit Edmonton cease to violate the bullying law and put the Canadian Labour Code Bullying law and process into action at 1 Dental Unit Edmonton.*
>
> *4. To be made whole.…*
>
> …
>
> [*Sic* throughout]

[10] She set out her second grievance, numbered 6492 and in Board file no. 566-02-39111, which is also dated June 10, 2014, as follows:

> …
>
> *I grieve Department of National Defence violated the/my collective agreement under Article 19 and violated the Privacy Act and the Canada Labour Board Law.*
>
> *I grieve Department of National Defence has violated my Collective Agreement under Article 19 and violated my Privacy as legislated under the Privacy Act as well as Violating the Canadian Labour Code Policy as mandated by law …*
>
> …
>
> [*Sic* throughout]

[11] She listed the desired corrective measures in her second grievance as follows:

> …
>
> *1. Department of National Defence conduct a full and thorough investigation on 1 Dental Unit Edmonton manager MWO Ama Aldrich which also includes actions or non-action taken by Lt. Col Bussiere, Lt. Col Ross and Col. Goheen at Dental Clinic Ottawa.*
>
> *2. Department of National Defence conduct a thorough investigation into non-compliance by managers at 1 Dental Unit Edmonton of the Canadian Labour Code as mandated by Law.*
>
> *3. Department of National Defence conduct a thorough investigation into non-compliance and violation of my Privacy as mandated by law under the Canadian Privacy Act.*
>
> *4. Department of National Defence conduct a full and thorough investigation into a SERLO process used by 1 Dental Unit Det which resulted in the termination of my position however military member have been placed in my role as DCP Clerk, which was my position.*
>
> *5. Department of National Defence conduct a full and thorough investigation into MWO Aldrich's bias towards me on a personal level which resulted in her violating my Canadian Human Rights, my Privacy as legislated under the Privacy Act and her violating the Canadian labour laws.*

> *7. Department of National Defence investigate the SERLO process and why and low the SERLO process was only done in one Dental Clinic across Canada in Department of National Defense and why MWO Aldrich's referral was used and led to the termination of my position when there was a harassment complaint and a Canadian Human Rights Act complaint against her initiated by me and for a second time.*
>
> *8. Department of National Defence investigate why out of over 25 Department of National Defences, Dental Clinics across Canada, with Edmonton being one of the largest, why my position was targeted for termination and I was the only clerk who settled a prior Canadian Human Rights complaint, which I submitted several years ago. The work that I did is being done by military personnel.*
>
> *I was also the only clerk in my dental clinic that had an accommodation for a workplace injury and MWO Aldrich was the manager used as my reference, not chosen by me, but was a huge contributor to me being terminated.*
>
> *9. The SERLO process be done properly and with fairness and non discriminating information used, that I feel was used because of conflict and retaliatory action by management for a prior settlement relating to my Canada Human Rights complaint against management at Department of National Defence, Dental Clinic and Ottawa clinic managers.*
>
> *10. To be made whole.…*
>
> …
>
> [*Sic* throughout]

[12] The grievor stated that the allegations relating to the SERLO (selection of employees for retention or layoff) process would be withdrawn as the Public Service Staffing Tribunal and the Federal Court have already addressed them. She submitted that the core aspects of the other grievances have never been heard, and the Board has jurisdiction over them.

[13] The employer made a final set of written submissions by way of a rebuttal on October 31, 2023. It maintained that the subject matter of these grievances consists of discrimination allegations that the Board's predecessor has already addressed in *Saunders v. Deputy Minister of National Defence*, 2014 PSST 13 ("*Saunders* 2014"). It repeated that the Board is without jurisdiction to hear the alleged *Privacy Act* (R.S.C., 1985, c. P-21; "the *Privacy Act*") and *Canada Labour Code* (R.S.C., 1985, c. L-2) complaints.

[14] On October 31, 2023, the employer added that the grievor seeks to change the nature of her grievances, and it cited *Burchill v. Attorney General of Canada*, 1980

CanLII 4207 (FCA), and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, for the proposition that the grievor was precluded from changing the nature of the grievances referred to the Board.

[15] In support of its *Burchill* argument, the employer observed as follows that in her list of corrective measures, the grievor did not ask for investigations into alleged instances of the collective agreement not being complied with:

> …
>
> *… Rather, she asks for an investigation into non-compliance with the* Canada Labour Code *and the* Privacy Act. *The question of potential violations of Article 6 of the collective agreement, and of any other violations of workplace policy or unspecified collective agreement issues, do not arise within even a liberal interpretation of the grievances presented to the Employer. Further, these issues have not been discussed within the grievance process. As such, these issues are new arguments at adjudication, and the Bargaining Agent is precluded from raising them now.*
>
> …

[16] The employer submitted that the essence of the allegations in these grievances pertains to interpretations of the *Privacy Act*, not a collective agreement.

[17] The employer cited *Brown v. Canada (Attorney General)*, 2011 FC 1205, for the proposition that precludes filing a grievance when another administrative procedure for redress is provided under another Act of Parliament other than the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). Recourse is available under the *Privacy Act*.

[18] The employer submitted that for all those reasons, the Board lacks the jurisdiction to hear these grievances.

II. Analysis and reasons

[19] I have read the Board's decision in the *Saunders* 2014 matter and the Federal Court's review. Nothing turns on the Federal Court decision so the focus of my attention is on the *Saunders* 2014 decision.

[20] The Board's decision in the *Saunders* 2014 matter indicates that at least some evidence was heard with respect to the grievor's allegations of bias and discrimination. At paragraphs 1 and 2:

> *[1] … Her principal allegations are that she and the other person assessed in the process for the selection of employees for retention*

> *or lay-off (SERLO) held positions that were not similar, that members of the assessment board and a referee were biased against her, and that the respondent discriminated against her because of her disability.*
>
> *[2] The respondent denies these allegations and maintains that there was no abuse of authority in the selection of the complainant for lay-off. It asserts that the two employees assessed in the SERLO process held similar positions with similar duties. It also maintains that the assessment board members and the referee were not biased against the complainant and that the complainant's disability was not a factor in the decision to lay her off.*

[21] Some evidence on bias was adduced at the hearing into the *Saunders* 2014 matter. This is reflected at paragraphs 31 to 54 under the heading, "Was there bias against the complainant?" The decision maker's finding is at paragraph 54 and states that "… the complainant did not establish that there is a reasonable apprehension of bias against her in relation to her assessment."

[22] The evidence on discrimination adduced at the hearing into the *Saunders* 2014 matter is reflected in that decision at paragraphs 55 to 80 under the heading, "Did the respondent discriminate against the complainant?" The decision maker's finding is at paragraph 80, as follows:

> *[80] The respondent has therefore provided a reasonable explanation in answer to the* prima facie *case of discrimination. The evidence establishes that the complainant was selected for lay-off because* [name redacted] *scored higher in the assessment of effective interpersonal relationships, the qualification that the respondent had identified as the determining factor for identifying which employee would be laid-off [sic]. The complainant's physical disability had no impact on the assessment of that qualification because it was assessed through an interview consisting of oral questions and answers, as well as reference checks in which the complainant did not participate.*

[23] In grievances 566-02-39110 and 566-02-39111, the employer argues the Board has no jurisdiction because the grievor seeks to relitigate the bias and discrimination issues.

[24] In *Tuccaro v. Canada*, 2014 FCA 184 at paras. 12 to 14, the Federal Court of Appeal held as follows:

> *[12] The Tax Court Judge identified* res judicata *as the basis for the Crown's motion to strike the paragraphs related to Treaty 8. In* Angle v. Minister of National Revenue, *[1975] 2 S.C.R. 248, Dickson J. described* res judicata *as follows:*

> *3 In earlier times* res judicata *in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel* per rem judicatum. *This form of estoppel, as Diplock L.J. said in* Thoday v. Thoday, *[[1964] P. 181], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of $34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(c) proceedings. The second species of estoppel* per rem judicatum *is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in* Hoystead v. Federal Commissioner of Taxation *[(1921), 29 C.L.R. 537)], at p. 561:*
>
> > *I fully recognize the distinction between the doctrine of* res judicata *where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").*
>
> *[13] It is evident from this excerpt that issue estoppel was initially described by Higgins J. as a distinct and separate doctrine from* res judicata *and then later by Diplock L.J. and Dickson J. as one of the two species of* res judicata. *In the most recent case of Genpharm Inc. v.* The Minister of Health, Procter & Gamble Pharmaceuticals Canada, Inc. and the Procter & Gamble Company, *2002 FCA 290, [2003] 1 F.C. 402) Rothstein J. (as he then was) writing on behalf of this Court also described issue estoppel as one of the species of* res judicata. *As noted by the Alberta Court of Appeal in* 420093 B.C. Ltd. v. Bank of Montreal, *1995 ABCA 328, [1995] A.J. No 862 at paragraph 18, the requirements to establish either cause of action estoppel or issue estoppel are essentially the same.*
>
> *[14] The requirements for issue estoppel to apply are set out in* Angle *by Dickson J. (who was quoting from the decision of Lord Guest in* Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), *[1967] 1 A.C. 853 at p. 935):*
>
> > *(1) …the same question has been decided;*
> >
> > *(2) … the judicial decision which is said to create the estoppel was final; and,*
> >
> > *(3) … the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*

[25] It is true that the parties are the same in these grievances as they were in the *Saunders* 2014 matter. It is also true that some aspects of the bias and discrimination issues have already been the subject of a final judicial decision, but the grievor

appears to raise different issues in grievances carrying Board file numbers 566-02-39110 and 566-02-39111.

[26] The grievor alleged bias and discrimination at the hands of Master Warrant Officer (MWO) Aldrich (whom she sometimes referred to as "Aldridge" in her pleadings of July 24, 2023). The grievance in Board file no. 566-02-39111 articulates her requested corrective measures, including the following:

> …
>
> *… Department of National Defence conduct a full and thorough investigation into MWO Aldrich's [sic] bias towards me on a personal level which resulted in her violating my Canadian Human Rights, my Privacy as legislated under the Privacy Act and her violating the Canadian labour laws.*
>
> …

[27] At paragraphs 47 to 53 of the *Saunders* 2014 matter, the decision maker dealt with evidence about MWO Aldrich's relationship with the grievor in the context of the SERLO process and found no bias or discrimination. However, there is nothing in the *Saunders* 2014 decision to indicate that two separate allegations in particular: namely, the employer's having provided information to the grievor's ex-husband and the employer's having accessed her work locker without authorization, were ever litigated.

[28] The doctrine of *res judicata* does not apply here, and these two grievances must be heard. I find that the issues raised by the grievor are not new issues, they are issues articulated in her original grievances, so *Burchill* does not apply.

[29] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

III. Order

[30] The grievances in Board file nos. 566-02-39110 and 566-02-39111 are to be scheduled for a hearing before the Board.

September 3, 2024.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board